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Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the Sixth Circuit are fully presented in the Brief for the Petitioner. The opinion of the Court of Appeals is reported at 509 F.2d 197.

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

COUNTER STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the Warren-Trumbull Council for Economic Opportunity, a Community Action Agency which was organized for the sole purpose of receiving funds from the Office of Economic Opportunity pursuant to the Economic Act of 1964, which received all of its cash funds from the OEO (as a grantee, not a contractor), and which was closely regulated and supervised thereby, is a "corporation primarily acting as, instrumentality or agency of the United States" and not a contractor with the Federal Government so as to make the United States liable for the torts thereof, pursuant to the Federal Tort Claims Act.

COUNTER STATEMENT OF THE CASE

This is an action brought pursuant to the Federal Tort Claims Act to recover money damage caused respondents by reason of personal injuries and loss of services, resulting from an automobile accident which occurred on September 3, 1970, in the vicinity of Conneaut Lake in Mercer County, Pennsylvania. Joseph V. Orleans, the minor respondent, was injured, which resulted in the amputation of his right arm, when the automobile in which he was a passenger left the road and struck a parked truck. The automobile was driven by Robert Walker, acting as a temporary employee and driver for the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc. (hereinafter referred to as WTCEO). The automobile was at the time filled with children returning from an outing organized and sponsored by this agency.

Following the filing of the complaint and an answer thereto, petitioner United States of America filed a motion for summary judgment on the theory that the WTCEO was not a "federal agency" within the meaning of that term as defined in 28 U.S.C. Par. 2671. Extensive discovery was undertaken by the respondents and depositions and affidavits were filed by them in opposition to the motion for summary judgment.

The affidavits and depositions submitted by the respondents, together with the regulations promulgated by the Office of Economic Opportunity, when taken together, reveal that the WTCEO was organized for the sole purpose of receiving OEO grant funds, had no other funds, and was directly and immediately controlled and supervised by the regional office of the OEO. The ultimate power of control exercised by the regional office of the OEO was demonstrated by its dissolution of the board and termination of the agency and its later appointment of Dr. Sidney I. Roberts to act as chairman and reorganize the agency. (Affidavits of Sidney I. Roberts and John L. Breckenridge are included in Appendix.)

Hundreds of pages of regulations outline programs which may properly be carried out and the manner in which they must be carried out. These regulations were presented in evidence. They, along with the various affidavits, showed that in actuality, so far as this particular community action agency was concerned, it acted solely for the purpose of carrying out the programs specified by Congress in the Economic Opportunity Act. During the conduct of these programs, it was closely supervised by the regional office of the Office of Economic Opportunity. The board of directors was selected as specified by the Economic Opportunity Act to consist of membership including one-third local representatives of government, one-

third local representatives of the community, and one-third local representatives of the area to be served.

The only thing offered by the petitioner was the affidavit of Wendall Verduin, regional director of the Office of Economic Opportunity, Chicago Regional Office. In that affidavit, he stated that WTCEO was granted funds by the OEO for the conduct of community action programs. The affidavit did not state that there was a contract between the United States and the WTCEO, nor was anything that purported to be a contract offered by the petitioner. The Economic Opportunity Act specifically provides that funds may be dispersed to a "grantee, contractor or sponsor of projects appropriate. . .", 42 U.S.C. Par. 2795 (a). The affidavit of Mr. Verduin stated that WTCEO was a grantee.

REASONS FOR DENYING THE WRIT

1. The first reason urged by the petitioner for the granting of the writ is that the decision of the Circuit Court of Appeals departs from the principles set forth by this Court in *Logue v. United States*, 412 U.S. 521. The *Logue* case involved the liability of the United States under the Federal Tort Claims Act for injuries to a prisoner while confined to a county jail pursuant to a contract between the County and the Federal Bureau of Prisons. This contract was entered into in accordance with 18 U.S.C. Par. 4002, authorizing such contracts and providing in the most general terms for the rates to be charged and conditions required of the jail. The Court held that the county was an independent contractor and there was no liability by reason of its acts or those of its employees, though pointing out that the United States might still be liable for negligence of its marshals.

In the *Logue* case there was first of all a contract. Secondly, there was no exercise of control over the county jail other than the general requirement in the contract that the county provide "reasonably decent, sanitary, and healthful quarters and subsistence."

This is far different from the situation in the instant case where no contract as such existed and where funds were turned over to a corporation which existed solely for the purpose of securing such funds and carrying out the programs enacted by Congress under the supervision and guidelines provided by the Office of Economic Opportunity.

2. The second reason set forth by the petitioner for the granting of the writ is that this case is in direct conflict with the decision of the Eighth Circuit in *Vincent v. United States*, 513 F.2d 1296. The facts as stated in the *Vincent* case were different than the facts in this case. In this case, extensive control over WTCEO was actually exercised by the regional office of the OEO. The evidence supporting respondents' position established that the regional Office of Economic Opportunity disbanded the agency at one time and then at a later time appointed a chairman to reorganize the agency. The only facts stated in the *Vincent* case opinion are:

> "The district court carefully reviewed this question and concluded that Mid-Delta was separate and distinct from the United States and the Office of Economic Opportunity and that federal control over Mid-Delta was insufficient to cause it to be considered an agency or instrumentality of the federal government within the meaning of the Federal Tort Claims Act."

This may well have been the situation in the *Vincent* case. Clearly it was not in this case, where the agency was created and existed solely for the purpose of carrying

out the programs specified by Congress in the Economic Opportunity Act and was subject to the control of the Office of Economic Opportunity for its very existence. If the statement of the circuit court in the *Vincent* case is accurate, the facts must be different.

The opinion of the circuit court in this case contains a detailed factual statement plus a thoughtful and well reasoned opinion. The decision in *Vincent* neither contains an analysis of the facts or any legal reasoning to support its conclusion.

CONCLUSION

The decision of the circuit court in this case is not in conflict with the decision of this Court in *Logue v. United States*, nor is it in conflict with the case of *Vincent v. United States*, when the facts are carefully considered.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF SIDNEY I. ROBERTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed in U. S. District Court, June 28, 1973)

Personally appeared before me Sidney I. Roberts, who after first being duly sworn and affirmed, says that in October of 1972, he was appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of The Warren-Trumbull Council for Economic Opportunity and that he was asked by the Chicago Regional Office to reorganize the Warren-Trumbull Council for Economic Opportunity. Presently, he has custody of the records of the Warren-Trumbull Council for Economic Opportunity and copies of certain of these records are attached hereto.

Further, the Affiant says that presently the entire funding of the Warren-Trumbull Council for Economic Opportunity is by funds of the United States except for some so-called "in kind" contributions, and that to his knowledge this is and has been the case throughout the history of the Warren-Trumbull Council for Economic Opportunity.

Further, the Affiant sayeth naught.

/s/ Sidney I. Roberts

(Jurat omitted in printing)

AFFIDAVIT OF JOHN L. BRECKENRIDGE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed in U. S. District Court, June 28, 1973)

Personally appeared before me John L. Breckenridge, who after first being duly sworn upon his oath, says that he is and has been an attorney at law and a resident of Trumbull County, Ohio, for a considerable period of time before 1965; that following the enactment of the Economic Opportunity Act of 1964 by the Legislature of the United States and the creation of the Office of Economic Opportunity, the Affiant was active in the formation and management of the Warren Council for Economic Opportunity, Inc., serving at various times both as president and member of the Board of Trustees, and was regularly in attendance at meetings from the time before the corporation was formed until after November 20, 1968.

That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.

After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.

The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.

One of the projects undertaken by the Warren Council for Economic Opportunity, Inc. was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811, which reads as follows:

> "The director shall encourage the development of neighborhood centers designed to promote the effectiveness of needed services in such fields as . . . child and economic development. . ."

And also, the provisions of 42 U.S.C.A., Sections 2701 et seq.

The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional direc-

tors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed.

Further the Affiant sayeth naught.

/s/ John L. Breckenridge

(Jurat omitted in printing)